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No. 03-1027

IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, Secretary of Defense,
Petitioner,

v.

JOSE PADILLA and DONNA R. NEWMAN,
as next of friend of Jose Padilla,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF JANET RENO, *ET AL.*, AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici curiae are lawyers with many years of government service in law enforcement and intelligence. They submit this brief to help the Court understand the legal and practical framework within which the government has historically tracked, identified, and punished terrorists, and prevented terrorist attacks.[1]

SUMMARY OF ARGUMENT

The government asserts that the President has inherent power to imprison an American citizen indefinitely and without access to counsel or courts, based upon his essentially unreviewable determination that the citizen is an enemy combatant, even when the citizen is arrested within the United States and not on an active field of battle. The government claims that this power is essential to perform the Commander-in-Chief's function of protecting the Nation from attack, and that, as Judge Wesley put it in his dissenting opinion in the Court of Appeals, "[t]he President would [otherwise] be without any authority to detain a terrorist citizen dangerously close to a violent or destructive act on U.S. soil unless Congress declared the area in question a zone of combat *or* authorized the detention." *Padilla v. Rumsfeld*, 352 F.3d 695, 728 (2d Cir. 2003) (Wesley, J., dissenting in part). Amici submit that this fear is unfounded.

The government argues that two interests justify the assertion of presidential authority: preventing acts of terror

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[1] A list of the amici who are filing this brief is set forth in the Appendix. Counsel for a party did not author this brief in whole or in part and no person or entity, other than the amici curiae or counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a) of this Court's rules, the parties have consented to the filing of this brief. Copies of the consents have been filed with the Clerk of the Court.

by enemy combatants and gathering intelligence about terrorist threats. Pet. Br. at 28-30. These are critical national interests. But suggesting that the sweeping power the President asserts here is necessary to accomplish them undervalues the arsenal of tools already at the government's disposal to fight terrorism. Our laws provide robust investigative techniques and ample detention and prosecution authority against citizen and non-citizen terrorists alike. In the last few years alone, the government has arrested and convicted numerous potential terrorists and many who have provided them aid. According to the Director of the Federal Bureau of Investigation, the government and its allies have thwarted over a hundred terrorist attacks.[2] To the extent that prosecutions have not been possible, or terrorist attacks such as the tragedy of September 11 have occurred, there is no indication that the sweeping power claimed here by the Executive would have made any difference.

Indeed, this very case demonstrates that the authority asserted by the government is unnecessary. Respondent Jose Padilla was immediately detained as a material witness upon entry into the United States. And in declaring Padilla an enemy combatant, the President relied upon facts that would have supported charging Padilla with a variety of offenses. The government thus had the authority to arrest, detain, interrogate, and prosecute Padilla apart from the extraordinary authority it claims here. The difference between invocation of the criminal process and the power claimed by the President here, however, is one of accountability. The criminal justice system requires that defendants and witnesses be afforded access to counsel, imposes judicial supervision over government action, and

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[2] *The War Against Terrorism: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. 18 (2003) [hereinafter *War Against Terrorism Hearing*] (statement of FBI Director Robert S. Mueller).

places congressionally imposed limits on incarceration. The government in this proceeding claims the authority to imprison citizens without counsel, with at most extremely limited access to the courts, for an indefinite term.

Amici do not address the President's power to detain persons, including citizens, seized on an active field of combat. The exigencies of military action on the battlefield present an entirely different set of circumstances than the arrest of a citizen arriving at O'Hare International Airport. In this brief, however, we describe the ample authorities that exist – apart from the untrammeled power to detain citizens the President claims here – to investigate, apprehend, detain, and prosecute persons who may be planning terrorist acts against the United States.

ARGUMENT

I. THE GOVERNMENT HAS A VAST ARRAY OF TOOLS TO PROTECT THE UNITED STATES FROM TERRORIST ATTACK.

In the absence of specific congressional authorization, the danger that citizens of this country will commit acts of violence or conspire to do so has historically been dealt with as a law enforcement matter. Collectively, it is the experience of the amici curiae that the tools available now provide the Executive Branch with broad authority and flexibility to respond effectively to terrorist threats within our borders. Of course, no amount of government authority and resources can prevent every terrorist attack, any more than the government can prevent every robbery, murder, or fraud. But insofar as it can be said that terrorist atrocities, including the September 11 attacks themselves, resulted from any government "failures," they were not attributable to a lack of authority to detain American citizens indefinitely and incommunicado.

A. Existing Tools To Gather Intelligence About Terrorism

The primary tool for preventing terrorist attacks is the gathering of intelligence. Existing law provides the Executive Branch with a wide range of powers to uncover and monitor potential terrorist activities domestically, including physical surveillance, electronic surveillance, physical searches, subpoenas and other means of obtaining records.[3] Individuals may be detained and questioned pursuant to a variety of authorities – the criminal laws, the Immigration and Nationality Act, and the material witness statute, among others. And Congress, recognizing that investigations often require quick action, has provided emergency provisions to ensure that the Executive is not unduly hindered in its ability to respond quickly to emerging terrorist threats. Indeed, these tools for gathering intelligence are so productive that using them to conduct covert surveillance of potential terrorists may be a more effective long-run strategy than arrests and detention.[4]

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[3] The government can also conduct electronic surveillance and physical searches overseas, and can work cooperatively with foreign law enforcement and intelligence agencies. There are generally no constitutional restrictions on the use of investigative techniques against non-United States persons overseas. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990); *see United States v. Bin Laden*, 126 F. Supp. 2d 264, 276 (S.D.N.Y. 2000). Electronic surveillance and physical searches can be conducted against U.S. persons abroad to obtain foreign intelligence information, under certain restrictions imposed by the Executive Branch. Executive Order 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981).

[4] *See* Jim McGee, *Ex-FBI Officials Criticize Tactics on Terrorism: Detention of Suspects Not Effective, They Say*, Wash. Post, Nov. 28, 2001, at A1.

1. *Physical Surveillance*

There are few constitutional restrictions on the government's ability to gather intelligence through physical surveillance (*i.e.*, the observation of people and activities). *See, e.g., Reporters Comm. for Freedom of the Press v. AT&T Co.*, 593 F.2d 1030, 1064 (D.C. Cir. 1978) ("When used in good faith, investigative techniques such as physical surveillance . . . violate no constitutional rights of the suspects involved."), *cert. denied*, 440 U.S. 949 (1979). A warrant is generally required only when the surveillance involves physical or technological intrusion into the target's home or other private area. *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (surveillance of home with technology that is not in general public use requires warrant); *United States v. Torres*, 751 F.2d 875, 883 (7th Cir. 1984) (video surveillance inside target's business requires warrant), *cert. denied*, 470 U.S. 1087 (1985).

Accordingly, federal agents are permitted freely to conduct "[p]hysical or photographic surveillance of any person." U.S. Dep't of Justice, Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations § II(B)(6)(g), at 10 (May 30, 2002), http://www.usdoj.gov/olp/generalcrimes2.pdf. Also, "[f]or the purpose of detecting or preventing terrorist activities, the FBI is authorized to visit any place and attend any event that is open to the public, on the same terms and conditions as members of the public generally." *Id.* § VI(A)(2), at 22. These Guidelines were recently amended to expand the FBI's authority to conduct investigations, eliminating "unnecessary procedural red tape" that could interfere with the prevention of terrorist activities. Attorney General John Ashcroft, Remarks on Attorney General

Guidelines (May 30, 2002), http://www.usdoj.gov/ag/speeches/2002/53002agpreparedremarks.htm.[5]

2. *Electronic Surveillance*

Within the United States, the government can intercept communications of potential terrorists pursuant to either Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et seq.*, or the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801 *et seq.* These authorities were significantly expanded by the passage of the USA PATRIOT Act.[6] Under Title III, a federal court can issue an order authorizing surveillance upon a showing of probable cause to believe that an individual – not necessarily the target of the surveillance – has committed, or is about to commit, one of a large number of enumerated offenses, and that communications relating to that offense will be intercepted. 18 U.S.C. § 2518(3)(a), (b).[7] The potential predicates for electronic surveillance under Title III

5 The Justice Department also recently revised its guidelines governing the conduct of national security investigations, including terrorism investigations. These guidelines are classified and are available publicly only in heavily redacted form. U.S. Dep't of Justice, Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collections (Oct. 31, 2003), http://www.usdoj.gov/olp/nsiguidelines.pdf.

6 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. 107-56, 115 Stat. 272 (2001).

7 Title III also requires a showing that normal investigative procedures have been or are likely to be unsuccessful. 18 U.S.C. § 2518(1)(c). In practice, this showing has not proved difficult for the government. *See, e.g., United States v. Santana*, 342 F.3d 60, 65 (1st Cir. 2003) (government must show reasonable good faith effort to use normal investigatory methods but not that it exhausted all procedures), *cert. denied*, -- U.S. -- , 124 S. Ct. 1478 (2004); *United States v. McGuire*, 307 F.3d 1192, 1197-98 (9th Cir. 2002) (government has more latitude to wiretap when threat is grave).

include most terrorism-related offenses. *See id.* § 2516(1). Title III permits the interception of wire communications (such as telephone or cell phone calls), oral communications, and electronic communications (including e-mails, faxes, and pager transmissions). *Id.* § 2510(1), (2), (12). Orders can be issued for renewable 30-day periods. *Id.* § 2518(5).

Even when there is insufficient evidence to commence a criminal investigation, FISA provides the government with tools to investigate "international terrorism." 50 U.S.C. §§ 1801 *et seq.*[8] Electronic surveillance under FISA requires the government to obtain an order from a judge of the Foreign Intelligence Surveillance Court,[9] based upon a showing of probable cause to believe that the target of the surveillance is "a foreign power or agent of a foreign power" and is using the facilities or places where the surveillance will occur. *Id.* § 1805(a)(3)(A), (B). The definition of a foreign power includes "a group engaged in international terrorism or activities in preparation therefor." *Id.* § 1801(a)(4). An agent of a foreign power can include a U.S. citizen who "knowingly engages in . . . international terrorism, or activities that are in preparation therefor." *Id.* § 1801(b)(2)(C). FISA surveillance can be authorized for up to 90 days, 120 days, or one year, depending on the target, and can be renewed by the court. *Id.* § 1805(e). In 2002, the government obtained over 1,000 FISA orders targeting

8 "International terrorism" includes "violent [criminal] acts or acts dangerous to human life" intended to influence a nation or "intimidate or coerce" its population, either outside the United States or "transcend[ing] national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum." 50 U.S.C. § 1801(c).

9 The Foreign Intelligence Surveillance Court was created under FISA to consider applications for electronic surveillance in foreign intelligence investigations. 50 U.S.C. § 1803(a).

"terrorists, spies, and foreign powers who threaten our security." *War Against Terrorism Hearing*, *supra*, at 10 (statement of Attorney General John Ashcroft).[10]

To obtain a FISA warrant, the government must certify that "a significant purpose" of the surveillance is the collection of foreign intelligence information. 50 U.S.C. § 1804(a)(7)(B). This language, enacted as part of the USA PATRIOT Act, greatly enhanced the government's ability to use FISA to counter terrorist threats. Previously, some courts had permitted FISA surveillance only when intelligence collection was the government's "primary purpose." *See, e.g., United States v. Megahey*, 553 F. Supp. 1180, 1189-90 (E.D.N.Y. 1983), *aff'd sub nom. United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984). To ensure that this requirement was honored, and that FISA was not used in criminal investigations to bypass the stricter requirements of Title III, the Department of Justice established limits on the dissemination of FISA surveillance information to criminal investigators. *See In re Sealed Case*, 310 F.3d 717, 727-28 (For. Intel. Surv. Ct. Rev. 2002). The USA PATRIOT Act largely eliminated these limits, permitting a relatively free flow of information between intelligence and criminal investigators. *Id.* at 734-35.[11]

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[10] The government's annual FISA reports show that since its inception the Foreign Intelligence Surveillance Court has approved over 15,000 applications without modification, approved six applications with modifications, and declined to approve one application while granting leave to amend. *See* http://fas.org/irp/agency/doj/fisa/index.html.

[11] Similarly, the USA PATRIOT Act relaxed the requirements of grand jury secrecy and the confidentiality of intercepted communications, to permit criminal investigators to share relevant information with intelligence agents. USA PATRIOT Act § 203(a), 115 Stat. at 278-80 (permitting disclosure of grand jury materials when matters involve foreign intelligence or counterintelligence), *codified at* Fed. R. Crim. P. 6(e)(3)(D); USA PATRIOT Act § 203(b)(1), 115 Stat. at 280 (allowing

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Importantly, both Title III and FISA allow the government to conduct emergency surveillance without a court order if the need is so pressing that there is no time to obtain court approval. 50 U.S.C. § 1805(f) (allowing FISA surveillance for 72 hours before seeking court order); 18 U.S.C. § 2518(7) (allowing Title III surveillance for 48 hours before seeking a court order). According to FBI Director Robert S. Mueller, the government has made extensive use of these emergency provisions against terrorists.[12]

In addition to intercepting the contents of wire, oral, and electronic communications, the government can obtain a court order permitting the use of pen registers and trap and trace devices, merely by stating that the information is relevant to a criminal investigation or to protect against international terrorism. 18 U.S.C. § 3123(a); 50 U.S.C. § 1842(a), (c)(2). These devices allow investigators to record the receipt and transmission of electronic data such as dialed or received telephone numbers or e-mail and Internet usage. 18 U.S.C. § 3127(3)-(4). At a congressional hearing in 2002, a Department of Justice representative stated that the pen register and trap and trace authority "[a]bsolutely" had provided a successful tool in the fight against terrorism. *Tools Against Terror: Hearing Before the Tech., Terrorism & Gov't Info. Subcomm. of the Senate Comm. on the Judiciary*, 2002 WL 31272589, 107th Cong. (2002) (unpaginated) (statement of Deputy Assistant Attorney General Alice Fisher).

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government officials to disclose contents of intercepted communications if contents include foreign intelligence or counterintelligence), *codified at* 18 U.S.C. § 2517(6).

[12] *War Against Terrorism Hearing*, *supra*, at 16 (statement of FBI Director Mueller).

3. *Physical Searches*

The government's authority to obtain warrants to search for and seize evidence of a crime, based on probable cause, is well established. U.S. Const. amend. IV; *Illinois v. Gates*, 462 U.S. 213, 243-46 (1983); Fed. R. Crim. P. 41. Probable cause is a "practical, nontechnical conception that deals with the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act." *Maryland v. Pringle*, -- U.S. -- , 124 S. Ct. 795, 799 (2003) (internal quotations omitted). It is not "comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence." *Ornelas v. United States*, 517 U.S. 690, 696 (1996). Moreover, the government need not show probable cause to conduct searches at the border. *See United States v. Flores-Montano*, -- U.S. -- , 124 S. Ct. 1582, 1585-86 (2004).

In the case of international terrorism, the government can also obtain search warrants under FISA. FISA search warrants do not require a showing of probable cause to believe that a crime has been or will be committed. Rather, the government need only establish probable cause to believe that the target of the search is a foreign power or an agent of a foreign power and that the premises or property to be searched is owned, possessed, or used by a foreign power or an agent of a foreign power, and certify that a significant purpose of the search is to obtain foreign intelligence information. 50 U.S.C. §§ 1823(a)(7)(B), 1824(a)(3). FISA physical search warrants can authorize multiple searches over a period of time. *Id.* § 1824(c)(1)(D). FISA also contains emergency provisions, one of which allows the government to search the residence of a suspected terrorist for up to 72 hours before seeking court authorization if notice is provided immediately to the court. *Id.* § 1824(e)(1).

To protect national security and avoid alerting the targets, the government can execute a FISA search warrant in secret. *See* 50 U.S.C. § 1824(a) (authorizing *ex parte* order approving FISA physical search); *id.* § 1822(4)(A)(i) (court may order landlord or custodian to furnish assistance "necessary to accomplish the physical search in such a manner as will protect its secrecy"). Indeed, even in the case of traditional criminal searches, the USA PATRIOT Act permits a court to delay notifying a target of the search to protect an investigation. USA PATRIOT Act § 213, 115 Stat. at 286, *codified at* 18 U.S.C. § 3103a(b).

4. *Obtaining Records*

In addition to these extensive investigative powers, the government has far-reaching powers to obtain records and evidence. It may use the grand jury process to issue subpoenas and ferret out information about possible terrorist threats. There is no probable cause requirement for a grand jury subpoena; as this Court has recognized, the facts that might lead to a finding of probable cause, such as the "'identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.'" *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991). (quoting *Blair v. United States*, 250 U.S. 273, 282 (1919)). Thus, the scope of relevancy to a grand jury's inquiry is extraordinarily broad. *Id.* at 301 (records subpoenaed by a grand jury must be produced unless there is "no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation").

Similar broad power exists in investigations of international terrorism. FISA permits the FBI to obtain from the Foreign Intelligence Surveillance Court an order for the production of "any tangible things (including books, records,

papers, documents, and other items)" by certifying that the records are sought as part of an investigation to protect against international terrorism. 50 U.S.C. § 1861(a)(1), (b)(2).[13] The order must be entered *ex parte* and without disclosing the purpose of the investigation. *Id.* § 1861(c). Disclosure of the order, even by the recipient, is prohibited. *Id.* § 1861(d).

Indeed, in terrorism investigations the government can obtain certain types of records even without a court order by the use of so-called "national security letters." For example, 12 U.S.C. § 3414 grants the FBI the right to obtain financial records by certifying that they are sought for "foreign counter intelligence purposes to protect against international terrorism or clandestine intelligence activities." *Id.* § 3414(a)(1)(A)-(C), (a)(5)(A).[14] As under FISA, a government request under this provision may not be disclosed. *Id.* § 3414(a)(3), (a)(5)(D). National security letters can also be used to obtain credit records and transactional records of wire and electronic communications. 15 U.S.C. § 1681u; 18 U.S.C. § 2709(a).

5. *Interrogation*

The government has the ability to obtain information by questioning persons who may be associated with, or have information about, terrorists. There is, of course, no

[13] Section 215 of the USA PATRIOT Act expanded this power. 115 Stat. at 287. Previously, the FBI could only seek business records from a limited class of entities and the target had to be a "foreign power or an agent of a foreign power." 50 U.S.C. § 1862(a), (b)(2)(B) (2000).

[14] Recent legislation greatly broadened the range of "financial institutions" from which records may be obtained by national security letter to include currency exchanges, travel agencies, pawnbrokers, casinos, and the U.S. Postal Service. *See* Intelligence Authorization Act for Fiscal Year 2004 § 374(a), Pub. L. 108-177, 117 Stat. 2599, 2628 (2003), *codified at* 12 U.S.C. § 3414(d).

restriction on the government's ability to question persons in a non-coercive setting; agents are free to ask any question of any person, who is free to decline to answer or simply to walk away. *See, e.g., Florida v. Royer*, 460 U.S. 491, 497-98 (1983). If the agent has a reasonable suspicion of criminal activity, he or she may briefly detain the person for questioning. *Terry v. Ohio*, 392 U.S. 1 (1968). Persons who have been taken into custody can be questioned after they have been given the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966) and, if they request counsel, in the presence of counsel.

The government has argued that these requirements will impair its ability to obtain information from enemy combatants, and that it requires indefinite, uncounselled detention for effective interrogation of terrorists. *See Padilla v. Rumsfeld*, 243 F. Supp. 2d 42, 49-53 (S.D.N.Y. 2003). It may be true that in some cases the government will not be able to obtain information from citizens who are informed of their right to counsel, or that obtaining that information may be delayed – although as the District Court noted in this case, that conclusion itself is speculative. *Id.* at 51-53.[15] In fact, many terrorists who have been arrested and provided counsel have decided to cooperate and provide valuable information to the government. *See infra* pp. 22-24. Others might not cooperate even if detained indefinitely and without counsel. But more importantly, as a Nation we have chosen to place some limits on Executive authority in order to protect individual authority.

[15] In a study of interrogation of criminal suspects, over three-quarters of the suspects waived their *Miranda* rights, and almost two-thirds provided incriminating information after being warned. Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 276 tbl. 3, 280-81 tbl. 7 (1996).

B. Existing Tools to Apprehend Terrorists

When investigative tools produce information that an individual is involved with terrorism, the government has a variety of authorities under which it can arrest, detain, and question that person. Most obviously, a person can be arrested if there is probable cause to believe that he or she has committed a crime, *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001); *United States v. Watson*, 423 U.S. 411, 415-23 (1976), and can be held in custody after arrest.[16] Many federal statutes can be used to arrest and prosecute persons who actually commit terrorist acts.[17]

Of course, preventing a terrorist act from occurring is far more desirable than apprehending and punishing someone who has already completed an attack. In recent years, Congress has passed a number of statutes expanding and supplementing the government's authority to prosecute terrorists before they strike. These include a prohibition on

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[16] An arrested individual must be taken before a court "without undue delay," Fed. R. Crim. P. 5(a), and can be detained if no bail conditions would "reasonably assure . . . the safety of any other person and the community," 18 U.S.C. § 3142(e). Suspects believed to be involved with terrorism are likely to be detained as flight risks or dangers to the community even if they are not charged with terrorism offenses.

[17] *See, e.g.*, 18 U.S.C. § 32 (destruction of aircraft or aircraft facilities); *id.* § 844 (manufacture and handling of explosive materials); *id.* § 924(c)(1)(A)(iii) (possession of firearms in furtherance of crimes of violence); *id.* § 1111 (murder committed while conducting espionage or sabotage); *id.* § 1113 (attempt to commit murder or manslaughter within special maritime or territorial jurisdiction); *id.* § 1114 (murder of federal officer or employee); *id.* § 1117 (conspiracy to murder a U.S. person, U.S. officer, or foreign official); *id.* § 2332 (attempted homicide of U.S. national outside the U.S.); *id.* § 2332a(a)(1) (use of certain weapons of mass destruction); *id.* § 2332b (acts of terrorism transcending national boundaries); *id.* § 2381 (treason); *id.* § 2384 (seditious conspiracy); 49 U.S.C. § 46502 (aircraft piracy); *id.* § 46504 (interference with flight crew members and attendants).

providing "material support or resources," or concealing material support or resources, knowing or intending that they are for use in preparing for or carrying out a terrorist offense, 18 U.S.C. § 2339A; a prohibition on providing "material support or resources" to any terrorist organization designated by the Secretary of State, *id.* § 2339B;[18] and a prohibition on providing or collecting funds intending that they will be used to carry out a terrorist act, *id.* § 2339C. These statutes give the government considerable authority to prosecute individuals who are associated with terrorism, long before any terrorist act has been committed. For example, "material support" for terrorism includes not only weapons and personnel, but also training, safehouses, lodging, false documentation, communications equipment, financial services, and currency. *Id.* § 2339A(b).[19]

The government has also relied on the International Emergency Economic Powers Act (IEEPA)[20] to promulgate far-reaching regulations to disrupt the funding of terrorist activity. *See, e.g.*, Continuation of Emergency With Respect

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[18] As of March 2004, the Secretary of State had identified 37 groups as foreign terrorist organizations, including al Qaeda. *See* Press Release, Dep't of State, Redesignation of Foreign Terrorist Organizations (Mar. 22, 2004), http://www.state.gov/r/pa/prs/ps/2004/30649.htm.

[19] The Court of Appeals for the Ninth Circuit has held that section 2339B's prohibition of material support in the form of "personnel" and "training" is unconstitutionally vague and it required that the defendant have knowledge that the organization was a terrorist group. *Humanitarian Law Project v. Dep't of Justice*, 352 F.3d 382, 393-94, 403-04 (9th Cir. 2003). *But see United States v. Al-Arian*, No. 8:03-CR-77-T-30TBM, 2004 WL 516571, at *9-10 (M.D. Fla. Mar. 12, 2004) (finding it unnecessary to hold Section 2339B unconstitutionally vague and instead implying *mens rea* requirement).

[20] 50 U.S.C. § 1701(a) (providing the President with broad authority "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States if the President declares a national emergency with respect to such threat").

to the Taliban, 66 Fed. Reg. 35,363 (Jun. 30, 2001). Under IEEPA regulations, "no U.S. person may deal in property or interests in property of a specially designated terrorist, including the making or receiving of any contribution of funds, goods, or services to or for the benefit of a specially designated terrorist." 31 C.F.R. § 595.204 (2003).[21] Violations of the IEEPA regulations are felonies. 50 U.S.C. § 1705(b). The government can also freeze accounts or seize property belonging to terrorist organizations when these items come within the United States or within the possession of a United States citizen. 31 C.F.R. § 595.201.

U.S. citizens associating themselves with terrorist groups will often be subject to prosecution under other statutes as well. The seditious conspiracy statute prohibits plotting to overthrow the United States, to levy war against the Nation, or unlawfully to seize or possess any government property. 18 U.S.C. § 2384. Another statute forbids enlisting within the United States "with intent to serve in armed hostility against the United States." *Id.* § 2390. The Neutrality Act of 1794 prohibits various acts of war against entities with whom the United States is at peace. *Id.* §§ 958-962. The reach of these statutes is not limited to traditional conflicts between nations, but extends to terrorist activities.[22]

Finally, statutes of more general applicability can also be used to reach inchoate terrorist activity. *See, e.g.*, 18 U.S.C. § 371 (conspiracy to violate federal law); *id.* § 2332a(a)(1) (attempted use of a weapon of mass

[21] *See United States v. Lindh*, 212 F. Supp. 2d 541, 560-64 (E.D. Va. 2002) (upholding IEEPA regulations in prosecution of American who fought alongside the Taliban in Afghanistan).

[22] *See, e.g. United States v. Rahman*, 189 F.3d 88, 123 (2d Cir. 1999), *cert. denied*, 528 U.S. 1094 (2000) (seditious conspiracy); *United States v. Khan*, No. CRIM.03-296-A, 2004 WL 406338, at *23 (E.D. Va. Mar. 4, 2004) (Neutrality Act, 18 U.S.C. § 2390).

destruction).[23] A conspiracy charge does not require that a defendant actually carry out the goals of the conspiracy. Rather, the government must prove only an agreement to achieve an unlawful objective, a defendant's knowing and voluntary participation in that agreement, and the commission of an overt act (not necessarily by the defendant) that furthers the conspiracy. *United States v. Bayer*, 331 U.S. 532, 542 (1947). Similarly, establishing that a defendant attempted a crime requires only proof that he or she has "taken a substantial step towards that crime" and "had the requisite mens rea." *Braxton v. United States*, 500 U.S. 344, 348 (1991). In short, the government need not await the actual commission of a terrorist act to arrest, prosecute, and convict a would-be terrorist.

Even when there is insufficient evidence to charge a citizen with a crime, the material witness statute, 18 U.S.C. § 3144, permits the detention of a person whose testimony is "material in a criminal proceeding" if "it may become impracticable to secure the presence of the person by subpoena." This statute is an effective counter-terrorism tool for several reasons. Because a grand jury investigation is a "criminal proceeding" for purposes of this statute, *see United States v. Awadallah*, 349 F.3d 42, 49-64 (2d Cir. 2003); *Bacon v. United States*, 449 F.2d 933, 939-41 (9th Cir. 1971), and because of the broad scope of grand jury investigations, *see supra* p. 11, the government can detain a suspected

[23] Numerous specific conspiracy provisions could also apply to terrorist activity. *See, e.g.*, 18 U.S.C. § 37 (conspiracy to commit violence at international airport); *id.* § 175(a) (to collect or use biological weapons); *id.* § 229(a)(2) (to collect or use chemical weapons); *id.* § 372 (to injure any officer of the United States); *id.* § 1203(a) (to take hostages); *id.* § 2332a (to use a weapon of mass destruction); *id.* § 2332b(a)(2) (to terrorize across international boundaries), *id.* § 2384 (seditious conspiracy).

terrorist as a material witness before it has evidence sufficient to support a criminal arrest or indictment.[24]

The government can obtain a material witness warrant with relative ease. For a grand jury witness, the required showing can be made by a good faith statement by a prosecutor or investigating agent that the witness has information material to the grand jury. *Bacon*, 449 F.2d at 943; *Awadallah*, 349 F.3d at 65-66. Nor would establishing that a suspected terrorist poses a flight risk be an onerous task. *See* 349 F.3d at 69 (bail denied in part because witness failed to come forward with material testimony concerning terrorist attack).

Finally, the material witness statute can help prevent terrorist acts by incapacitating terrorists. A material witness may only be detained until his or her testimony has been secured. *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 413, 419-20 (5th Cir. 1992). However, if further investigation reveals evidence that the witness was actually part of a terrorist conspiracy or has committed perjury before the grand jury, he or she may be re-arrested as a criminal suspect, without the necessity of release. *See Awadallah*, 349 F.3d at 47, 63, 70; *In re Material Witness Warrant (Doe)*, 213 F. Supp. 2d 287, 303 (S.D.N.Y. 2002) (citing *United States v. Regan*, 103

[24] Following the September 11 attacks, the government detained a number of individuals as material witnesses to its investigation, half of whom were held for 30 days or more. Letter from Jamie E. Brown, Acting Ass't Attorney General, Office of Legislative Affairs, to Rep. F. James Sensenbrenner, Jr., Chairman, House Judiciary Committee, at 50 (May 13, 2003), http://www.house.gov/judiciary/patriotlet051303.pdf. *See also Padilla*, 352 F.3d at 699-700; *Awadallah*, 349 F.3d at 47; *In re Material Witness Warrant (Doe)*, 213 F. Supp. 2d 287, 288 (S.D.N.Y. 2002).

F.3d 1072, 1079 (2d Cir. 1997)).[25] The suspected terrorist will thus remain unable to perpetrate any attacks.[26]

C. Existing Tools to Protect Classified Information

Prosecution of terrorists often requires balancing the defendant's constitutional rights and the government's legitimate interests in protecting national security. Federal law amply recognizes these national security interests and protects them in a variety of contexts. Federal grand jury proceedings, and proceedings ancillary to the grand jury, are secret. Fed. R. Crim. P. 6(e); *see In re Newark Morning Ledger*, 260 F.3d 217, 226 (3d Cir. 2001) ("The secrecy afforded to grand jury materials under Fed. R. Crim. P. 6(e) extends beyond the actual grand jury proceeding to collateral matters, including contempt proceedings, which relate to grand jury proceedings and may potentially reveal grand jury information.") (citations omitted). For example, in the present case the material witness warrant for Padilla's arrest, and the affidavit submitted by the government in support of that warrant, remain sealed. More generally, the government

[25] For example, Terry Nichols, one of the perpetrators of the Oklahoma City bombing, was initially arrested and detained as a material witness, and was not actually charged with the crime for 18 days. *In re Material Witness Warrant*, 77 F.3d 1277, 1278-79 (10th Cir. 1996).

[26] In the case of non-citizens, the Immigration and Nationality Act provides additional authority to detain potential terrorists. Any alien seeking to enter the country who has engaged in terrorist activity, or who the government has reasonable ground to believe is likely to engage in terrorist activity, is inadmissible for national security reasons. 8 U.S.C. § 1182(a)(3)(B). Similarly, an alien who is lawfully in the country who engages in terrorist activity is deportable. *Id.* § 1227(a)(4)(A)-(B). "Engaging in terrorist activity" is broadly defined to include not only carrying out terrorist acts, but also planning or preparing for such acts, or membership in or material support for a terrorist organization. *Id.* § 1182(a)(3)(B)(iv). Any alien who the Attorney General certifies is deportable or inadmissible for national security reasons must be detained until removed. *Id.* § 1226a.

is permitted to withhold the identity of informants in many circumstances. *See, e.g., Roviaro v. United States*, 353 U.S. 53, 59-61 (1957). And, as happened in this case, courts will frequently permit the government to file papers under seal if disclosure of the information in those papers could harm national security. *See, e.g., United States v. Ressam*, 221 F. Supp. 2d 1252, 1264 (W.D. Wash. 2002) (denying press requests to unseal classified documents filed under seal).

The Classified Information Procedures Act (CIPA), 18 U.S.C. App. III, gives courts additional ability to protect classified materials during criminal prosecutions.[27] CIPA permits the court to authorize the government to delete classified information from any materials disclosed to the defendant, to substitute a summary of such classified documents, or to substitute admissions regarding the relevant facts that the classified information would tend to prove. *Id.* § 4. A defendant must notify the government and the court in writing before disclosing classified information. *Id.* § 5(a).

Before any classified information may be used at trial or pretrial, the government can request a hearing to determine its relevance and admissibility. *Id.* § 6(a). This hearing may be held *ex parte* and *in camera*. *See, e.g., United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998). If the court determines that the evidence is admissible, the government must then find an alternative method of getting the information to the jury that is less harmful to national

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[27] CIPA's constitutionality has been upheld. *See, e.g., United States v. Yunis*, 924 F.2d 1086, 1094 (D.C. Cir. 1991) (rejecting Fifth and Sixth Amendment challenges); *United States v. Lee*, 90 F. Supp. 2d 1324, 1326-29 (D.N.M. 2000) (same); *United States v. Poindexter*, 725 F. Supp. 13, 33-35 (D.D.C. 1989) (same). *But cf. Crawford v. Washington*, -- U.S. -- , 124 S. Ct. 1354 (2004) (holding that Confrontation Clause generally prevents use of testimonial statements by prosecution when defendant lacks opportunity to cross-examine witness).

security, such as providing an unclassified summary of the relevant information or admitting certain facts. 18 U.S.C. App. III, § 6(c); *United States v. Noriega*, 117 F.3d 1206, 1215 (11th Cir. 1997), *cert. denied*, 523 U.S. 1060 (1998). Ultimately, however, if no adequate substitute can be found, the court has the authority to strike certain counts, preclude certain evidence, make findings against the government, or even dismiss the case, if it is necessary in the interest of justice. 18 U.S.C. App. III, § 6(e)(2). A recent examination of the use of CIPA showed that charges are rarely dismissed.[28]

II. THE SWEEPING POWER THE PRESIDENT CLAIMS IS UNWARRANTED.

These authorities, broad and powerful on paper, have been effective in practice. Over the last decade, the investigative, detention, and prosecutive authorities discussed above have been used in many cases not only to identify, arrest, and punish persons who have committed terrorist acts,[29] but to disrupt and thwart terrorism before it can occur. A year ago Attorney General Ashcroft identified 211 terrorism-related criminal charges that had been brought to that date, with 108 convictions or guilty pleas. *War Against Terrorism Hearing*, *supra*, at 10 (statement of Attorney

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[28] Committee on Communications and Media Law, *The Press and The Public's First Amendment Right of Access to Terrorism on Trial: A Position Paper*, 57 The Record 94, 161 n.263 (2002) (authors found only one case in which a court dismissed charges pursuant to § 6(e)).

[29] *See, e.g., United States v. Yousef*, 327 F.3d 56 (2d Cir.), *cert. denied*, -- U.S. -- , 124 S. Ct. 353 (2003) (affirming convictions of defendants involved in 1993 World Trade Center bombing and conspiracy to hijack airliners); *United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998), *cert. denied*, 526 U.S. 1028 (1999) (affirming convictions of defendants involved in 1993 World Trade Center bombing); *Kasi v. Virginia*, 508 S.E.2d 57 (Va. 1998), *cert. denied*, 527 U.S. 1038 (1999) (affirming conviction of defendant who murdered CIA employees).

General Ashcroft). A listing of some of these cases illustrates the effectiveness of the investigative tools we have described to stop terrorists before they carry out their plans:

- Sheikh Omar Abdel Rahman and his followers were convicted of plotting a "day of terror" against New York City landmarks, including the United Nations building, the Lincoln and Holland Tunnels and the George Washington Bridge. The government used traditional investigatory powers, including physical surveillance, search warrants, and informants, to track the activities of this group, and arrested them when they had begun building an explosive device. *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999).

- Ahmed Ressam, the so-called "Millennium Bomber," was arrested in December 1999 as he attempted to enter the United States in a rental car containing homemade explosives and timers. Ressam eventually pleaded guilty and cooperated extensively with the government in its prosecution of others involved in the planned attacks. He also provided more general information about al Qaeda and its training camps in Afghanistan and identified potential terrorists.[30]

- Iyman Faris pleaded guilty to providing material support for terrorism. Faris visited an al Qaeda training camp in Afghanistan and investigated the destruction of bridges in the United States by severing their suspension cables. The government developed evidence through physical and electronic surveillance

[30] *See* Michael Powell & Christine Haughney, *Los Angeles Airport Intended Target, Terrorism Plot Defendant Tells Jury*, Wash. Post, July 4, 2001, at A2; *see also* Ann Davis, *Surprising Number of Bin Laden Followers are Helping U.S. Investigators*, Wall St. J., Dec. 21, 2001, at B1.

and a search of his residence. After his arrest Faris cooperated with investigators.[31]

- Several members of a terrorist cell in Portland, Oregon, were indicted on conspiracy, material support, and firearms charges. One of the defendants pleaded guilty and testified against the others, leading to guilty pleas from them. Six of the men had attempted to travel to Afghanistan to assist the Taliban. The government used electronic surveillance and the authorities of the USA PATRIOT Act to develop evidence in the case.[32]

- Six residents of New York State pleaded guilty to charges arising from their travel to Afghanistan and attendance at al Qaeda training camps. The evidence against them was developed from electronic surveillance. They agreed to cooperate with government investigations of terrorist activities.[33]

[31] *See* Jerry Markon, *Ohio Man Gets 20 Years for Al Qaeda Plot*, Wash. Post, Oct. 29, 2003, at A2; *FBI Questioned Faris After Sept. 11 Attacks*, Houston Chron., June 21, 2003, at 10; Ted Wendling, *Ohio Agents Tailed Terrorist for More Than a Year*, Plain Dealer, June 21, 2003, at A1; *see also* Press Release, Dep't of Justice, Iyman Faris Sentenced for Providing Material Support to Al Qaeda (Oct. 28, 2003), http://www.usdoj.gov/opa/pr/ 2003/October/03_crm_589.htm.

[32] *See* Lynn Marshall & Tomas Tizon, *Three Members of Terrorist Cell Sentenced; One of the 'Portland Seven' Expresses Sorrow for Trying to Join the Taliban After 9/11*, L.A. Times, Feb. 10, 2004, at A12; Blaine Harden & Dan Eggen, *Duo Pleads Guilty to Conspiracy Against U.S.*, Wash. Post, Oct. 17, 2003, at A3; *see also* Press Release, Dep't of Justice, Two Defendants in 'Portland Cell' Case Plead Guilty to Conspiracy to Contribute Services to the Taliban, Federal Weapons Charges (Sept. 18, 2003), http://www.usdoj.gov/opa/pr/2003/September/03_crm_513.htm.

[33] *See* John Kifner & Marc Santora, *Feds Say One in N.Y. Cell Arranged Training*, Pitts. Post-Gazette, Sept. 18, 2002, at A6; Tamer El-Ghobashy & Greg Smith, *E-Mail Led to Cell Bust*, N.Y. Daily News, Sept. 17, 2002, at 8; *see also* Press Release, Dep't of Justice, Mukhtar Al-

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- Earnest James Ujaama pleaded guilty to providing material support to terrorism related to his involvement in a 1999 plan to build a terrorist training camp in Oregon. After pleading guilty, Ujaama cooperated with the government, serving as a key witness in a grand jury investigation of an alleged top al Qaeda recruiter.[34]

- Sami Al-Arian, a university professor, and seven others were indicted for conspiring to finance terrorist attacks. The evidence against Al-Arian was derived from extensive FISA wiretaps, which could be used in the criminal case because of the new procedures enacted by the USA PATRIOT Act.[35]

As this discussion demonstrates, there is both a robust legal framework to combat terrorism and a demonstrated history of successful use of those authorities without resort to the extraordinary power claimed here by the President. Contrary to the fears expressed by Judge Wesley in his dissenting opinion, the President has ample "authority to detain a terrorist citizen dangerously close to a violent or destructive act on United States soil." *Padilla*, 352 F.3d at 728 (Wesley, J., dissenting in part). Indeed, there is no indication that any of these cases depended in any way upon such a detention.

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Bakri Pleads Guilty to Providing Material Support to Al Qaeda (May 19, 2003), http://www.usdoj.gov/opa/pr/2003/May/03_crm_307.htm.

[34] *See Witness Said Ready to Testify on Al Qaeda Suspect*, Wash. Post, June 2, 2003, at A2.

[35] *See* Jerry Seper, *Islamic Jihad Suspect Seeks to Represent Himself*, Wash. Times, May 27, 2003, at A1; Michael Fletcher, *Terror Traced to Tampa*, Tampa Trib., Feb. 21,. 2003, at 1; Jess Bravin & Glenn R. Simpson, *Confronting Iraq and Terror: Florida Professor, 7 Others Are Accused of Terror Funding*, Wall St. J., Feb. 21, 2003, at A8.

The record in the instant case demonstrates that these authorities were available, and to some extent were actually used, to deal with Padilla himself. Padilla was arrested on May 8, 2002, pursuant to a material witness warrant. *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002). The court issued the warrant based upon an affidavit from an FBI agent averring that Padilla possessed knowledge of facts relevant to a grand jury investigation of the September 11 attacks. *Id.* at 571. The affidavit was sealed by the District Court and remains under seal. Padilla was transported to New York, where he was detained and counsel was appointed to represent him. *Padilla*, 352 F.3d at 700. The government subsequently asked the court to vacate the material witness warrant and transferred Padilla to the custody of the Department of Defense based upon the President's determination that Padilla was an enemy combatant. *Id.* For almost two years thereafter, until his case came before this Court, Padilla was held incommunicado, without access to his lawyer. *See id.*

When Padilla was arrested pursuant to the material witness warrant, his terrorist plans were thwarted. He was then available to be questioned to the same extent as any other citizen suspected of criminal activity. Moreover, the facts set forth in the President's findings, and the facts presented to the District Court, are more than sufficient to support criminal charges against Padilla, including providing material support to designated terrorist organizations, 18 U.S.C. § 2339B; providing material support to terrorists, *id.* § 2339A; conspiracy to use a weapon of mass destruction, 18 U.S.C. § 2332a; and attempted use of a weapon of mass destruction, *id.* § 2332a(a)(1).[36] Finally, Padilla's history of

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[36] The government claims that Padilla traveled to Afghanistan, approached a senior officer of al Qaeda, proposed stealing radioactive material to build a "dirty bomb" and detonate it in the United States, researched such a project at an al Qaeda safe house in Pakistan, had

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travel outside the United States, previous criminal record, and terrorism-related activities clearly justified detaining him. 18 U.S.C. § 3142(e). In short, the procedures of the criminal law provided an ample basis to detain Padilla, to subject him to interrogation, and to keep him from carrying out any violent acts against the United States or any of its citizens. It is difficult to imagine any circumstances in which a terrorist would meet the standards for designation as an enemy combatant described by the government, *see* Pet. Br. at 27, and not be subject to arrest as a material witness or a criminal.

The difference between what the government did in this case, and what existing law authorizes it to do, is one of accountability and transparency. The government could have continued to detain Padilla, but would have been required to justify the detention to a court in an adversary proceeding, based on the traditional probable cause standard. The government could have questioned Padilla, but would have had to secure the consent of his lawyer to do so. The government could have convicted and imprisoned him, but would have had to do so after a trial in District Court. By denying him these protections, the Executive Branch is claiming a virtually unlimited right to arrest citizens within the United States based solely upon the President's determination that they are enemy combatants, and to imprison them incommunicado for an indefinite period of time without counsel and without meaningful judicial review.

This untrammeled power stands in stark contrast to the legal framework described above. Indeed, none of the

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"extended contacts" with al Qaeda, received training in furtherance of terrorist activities from al Qaeda, and was sent to the United States to conduct reconnaissance or terrorist attacks on behalf of al Qaeda. *Padilla*, 233 F. Supp. 2d at 572-73.

governmental powers described in this brief permits any substantial deprivation of a citizen's liberty or invasion of his or her privacy without congressional authorization and judicial oversight. To pick just one example, electronic surveillance under either Title III or FISA is authorized by statute; requires a court order based on a factual showing under oath; is limited in time and scope; and is subject to subsequent judicial review in court proceedings. *See supra* pp. 6-9. Even in emergency situations, electronic surveillance is permitted without judicial supervision for only a brief period of time. Similarly, the arrest and detention of citizens within the United States pursuant to the criminal law or the material witness statute normally requires a judicial warrant and carries the right of subsequent judicial review with the assistance of counsel; while law enforcement officials may arrest individuals without a warrant, they must timely demonstrate to a court that they had probable cause to do so. *Gerstein v. Pugh*, 420 U.S. 103 (1975); Fed. R. Crim. P. 5; *Awadallah*, 349 F.3d at 59-62 (summarizing numerous procedural safeguards afforded to material witnesses).

The broad and largely unsupervised authority claimed by the Executive Branch is also inconsistent with the fundamental principles of our Constitution. Arbitrary arrest and imprisonment by the King was one of the principal evils that the Constitution and the Bill of Rights were meant to address. *See Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946). These principles have been adhered to even when national security is implicated. For example, this Court rejected the claim that the Executive had inherent authority to detain an alleged Confederate sympathizer outside the field of battle where courts were functioning. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) It questioned the Executive's authority to conduct electronic surveillance in the interest of national security, at least when foreign powers are not involved. *United States v. United States District Court*, 407 U.S. 297 (1972). And it rejected a claim that the Executive

had authority to seize steel mills in wartime. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952). The power which the Executive seeks in this case is far broader and far more terrifying.[37]

Congress has recognized the danger inherent in Executive power to detain citizens and has provided that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). This statute could not be a clearer congressional rejection of the inherent Executive authority claimed here.[38] The government contends, however, that the Joint Resolution passed by Congress on September 18, 2001, sufficiently authorizes the actions it took here to satisfy section 4001(a). Pet. Br. at 38-44. But that Resolution merely grants broad and generic authority to use military force against the nations, organizations and persons that the President determines were involved in the September 11 attacks. Pet. App. 59a-60a. As the Court of Appeals held, there is "no reason to suspect" that Congress, in granting authority to use military force, "believed it would be authorizing the detention of an American citizen already held in a federal correctional institution and not 'arrayed against our troops' in the field of battle." *Padilla*, 352 F.3d at 723 (quoting *Hamdi v. Rumsfeld*, 316 F.3d 450, 467 (4th Cir. 2003)). A clearer statement of congressional authorization

[37] For the reasons stated by the Court of Appeals, *Ex parte Quirin*, 317 U.S. 1 (1942), upon which the government principally relies, does not support the detention of Padilla in this case. *Padilla*, 352 F.3d at 715-17.

[38] The government claims that, despite the plain and unqualified language of this statute, it does *not* apply to detention or imprisonment by the military. Pet. Br. 44-49. But the statute refers broadly to detention or imprisonment "by the United States," not by any particular department or agency of the Nation.

should be required before this Court permits the Executive to imprison citizens indefinitely only upon its own say-so.[39]

Amici do not question the power of the President, as Commander-in-Chief, to detain persons, even citizens, seized on an active field of battle. We recognize that the President has broad authority as Commander-in-Chief during a time of war or threat to the security of our Nation. *See, e.g., The Prize Cases*, 67 U.S. (2 Black) 635 (1862). But the exigencies of the battlefield present a vastly different circumstance than even the bustle of O'Hare Airport. There is little or no risk in this case of "fettering . . . a field commander" or "divert[ing] his efforts and attention from the military offensive abroad to the legal defensive at home." *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950). While the government suggests that Padilla was arrested on a "battlefield," Pet. Br. at 37-38, under its standards the "battlefield" against terrorism could extend throughout the world and the "hostilities" could be of indefinite and perhaps undefinable duration. Legal standards developed to deal with traditional wars cannot be imported wholesale into this very different context.

Amici recognize that these limitations might impede the investigation of a terrorist offense in some circumstances. It is conceivable that, in some hypothetical situation, despite the array of powers described above, the government might be unable to detain a dangerous terrorist or to interrogate him or her effectively. But this is an inherent consequence of the limitation of Executive power. No doubt many other steps could be taken that would increase our security, and could

[39] Congress does not lack the ability to act quickly in response to national emergencies. The Resolution authorizing the use of force was passed one week after the attacks of September 11; the far more complicated USA PATRIOT Act was passed less than seven weeks after those attacks.

enable us to prevent terrorist attacks that might otherwise occur. But our Nation has always been prepared to accept some risk as the price of guaranteeing that the Executive does not have arbitrary power to imprison citizens. *McNabb v. United States*, 318 U.S. 332, 343 (1943). It is amici's belief, moreover, that given the expansive authorities that otherwise exist, the risk to the Nation from denying the Executive the authority it seeks in this case is minimal. If additional Executive authority to detain citizens found within the United States is deemed necessary to protect against terrorism, that authority should come through congressional action, where the boundaries of that power can be defined, the terms of any such detention can be set, and the procedure can be subject to judicial oversight. This Court has never countenanced the untrammeled authority the Executive Branch seeks in this case; it should not do so now.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Amici Curiae in Support of Respondents

JANET RENO served as Attorney General of the United States from 1993 to 2001. After working for three years in the Dade County State Attorney's Office in Florida, she became State Attorney for Dade County in 1978. She served in that office until she became Attorney General.

PHILIP B. HEYMANN was Deputy Attorney General of the United States from 1993 to 1994. He also served as Assistant Attorney General in charge of the Criminal Division of the Department of Justice between 1978 and 1981. He has held a number of positions in the Department of State, and has written two books about terrorism. Presently he is a professor of criminal law at Harvard Law School.

ERIC H. HOLDER, JR. was Deputy Attorney General of the United States from 1997 to 2001, and Acting Attorney General in 2001. For over 20 years, he was a trial attorney in the Criminal Division of the Department of Justice. In 1988, he became an Associate Judge on the Superior Court for the District of Columbia. From 1993 to 1997, he served as the United States Attorney for the District of Columbia.

JEFFREY H. SMITH was the General Counsel of the Central Intelligence Agency from 1995 to 1996. In 1993, he was appointed by the Secretary of Defense to serve on the Commission to Review the Roles and Missions of the Armed Services. Previously, he chaired the Joint Security Commission established by the Department of Defense and the Central Intelligence Agency to review security policy and practices in the defense and intelligence communities.